

ESTTA Tracking number: **ESTTA523698**

Filing date: **02/26/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91204777
Party	Plaintiff Apple Inc.
Correspondence Address	JOSEPH PETERSEN KILPATRICK TOWNSEND STOCKTON LLP 31 WEST 52ND STREET, 14TH FLOOR NEW YORK, NY 10019 UNITED STATES JPetersen@kiltown.com, AlJones@kiltown.com, ARoach@kiltown.com, agarcia@kiltown.com, NYTrademarks@kiltown.com, tadmin@kiltown.com
Submission	Reply in Support of Motion
Filer's Name	Alicia Grahm Jones
Filer's e-mail	JPetersen@kiltown.com, AlJones@kiltown.com, ARoach@kiltown.com, agarcia@kiltown.com, NYTrademarks@kiltown.com, tadmin@kiltown.com
Signature	/Alicia Grahm Jones/
Date	02/26/2013
Attachments	Feb. 26, 2013 Jones Reply Declaration ISO Opposer's Motion to Compel.PDF ( 9 pages )(96063 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. **85/379,097**

For the mark: **CRAPPLE**

Filed: July 22, 2011

Published: December 20, 2011

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APPLE INC.,	:	
	:	Opposition No. 91204777
Opposer,	:	
	:	
v.	:	
	:	
NINJA ENTERTAINMENT	:	
HOLDINGS, LLC,	:	
	:	
Applicant.	:	
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**DECLARATION OF ALICIA GRAHN JONES IN FURTHER SUPPORT OF  
OPPOSER’S MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND  
PRODUCTION OF DOCUMENTS**

I, Alicia Grahn Jones, declare as follows:

1. I am an attorney at the law firm of Kilpatrick Townsend & Stockton LLP, and am one of the attorneys representing Opposer Apple Inc. (“Apple”) in this action against Applicant Ninja Entertainment Holdings, LLC (“Applicant”). I am over the age of twenty-one, I am competent to make this Declaration, and the facts set forth in this Declaration are based on my personal knowledge.

2. On January 30, 2013, I received from Applicant’s correspondent, Daniel Kelman, an emailed letter purporting to contain Applicant’s responses to Apple’s First Set of Interrogatories. A true and correct copy of the January 30, 2013 letter I received from Mr. Kelman is attached hereto as **Exhibit A**.

3. Applicant did not provide, and still has not provided, written responses to each of the Document Requests served by Apple.

4. Applicant still has not produced a single document in response to Apple's twenty-three Document Requests.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Dated: February 26, 2013

/Alicia Grahm Jones/  
Alicia Grahm Jones

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
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	:	
Applicant.	:	
-----X		

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing DECLARATION OF ALICIA GRAHN JONES IN FURTHER SUPPORT OF OPPOSER'S MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS has been served on Ninja Entertainment Holdings, LLC by sending a copy via e-mail to Daniel Kelman at [danielkelman@gmail.com](mailto:danielkelman@gmail.com) and depositing a copy with the United States Postal Service as First Class Mail, postage prepaid, in an envelope addressed to:

Daniel Kelman  
1934 Josephine Street  
Pittsburgh, Pennsylvania 15203

This the 26th day of February, 2013.

/Alicia Grahn Jones/  
\_\_\_\_\_  
Alicia Grahn Jones

# **EXHIBIT A**

January 30, 2013

Daniel J. Kelman  
(917) 426-5073  
danielkelman1@gmail.com

**Via Email**

**Re: Apple v. Ninja: Response to Discovery Requests**

Alicia and Joe,

I apologize for the delay. Included below is the information you requested in your discovery demands. The numbered questions from your interrogatories are followed by answers. As stated before, my inbox contains no relevant correspondence between Milton Barr and myself. To the extent Crapple and an association with Apple is mentioned, such is the product of an attorney-client consultation and not discoverable.

Best,

Daniel Kelman

1. Describe in detail the circumstances surrounding the selection, adoption, use, and intended use of Applicant's Mark, including but not limited to any other names or marks that were considered.

Milton Barr is in the business of buying and selling electronics. Milton hit upon an idea to purchase more electronics: create a website offering to purchase items. Milt decided to create such a website specializing in the purchase of smart phones, reasoning that the market for smartphones was rapidly growing and that people would be amenable to second hand purchase as the price of new smartphones remains comparatively high. Daniel had for quite some time been Milton's business attorney and at times partnered with him in business. Daniel agreed to help with the matter.

In order to sell the idea of purchasing second-hand smartphones to consumers, Milt and Daniel sought a name that would poke fun at the notion that the phones were no longer status symbols. To convey this message they considered numerous different adjectives and modified them with appropriate sounding "I" endings.

In selecting nouns, they sought a noun that would combine the messages of frugality, pro-environment, pro-recycling and urban. To accomplish this, a brand name was sought that would poke fun at the notion of a smart phone as a status symbol. A used phone might be considered "crud", "crap", or "junk", "garbage",

trash", "shit"—there are many such ways to convey the perceived quality of a used phone and we considered plenty.

In selecting an ending to modify our noun, we decided to place an extra "l-sound" at the end. For instance, "junk" becomes "junkle"; "shit" becomes "shittle" (my personal favorite, but too controversial for American markets) "garbage" becomes "garbagelle"; "trash" becomes "trashelle". "Crap" and "crud" both have options: they modify nicely as "Crapple", "Crapelle" "Crappelle", or "Crudelle", "Cruddle". Ultimately, "Crapple" was chosen because "Crappelle"/"Crapelle" and all "elle" words sounded and looked too French (there was a desire avoid association with high end products and keep it American). It was close between "Cruddle" and "Crapple", but "Cruddle" sounds too much like the word "cradle" and an association between used cell phones and an outdated term for something you put a baby in was decided to be not advantageous.

You may be curious why we wanted to modify the brand to be named in by adding an "l-sound" in such a way. Daniel's brother, Zachary Kelman, some years back owned a flawed cell phone that often misplaced an extra "l" at the end of a sentence. Daniel and Zachary at times joked when chatting by adding an extra "l" to the end of their spoken nouns. It became something that caught with friends as well when drinking (e.g. "drinkle").

It did dawn on us that the name was similar to "Apple", but we reasoned that there was zero chance that any consumer would think that the Crapple brand was associated with the richest corporation in the world by marker capitalization.

2. Describe in detail how and why Applicant's Mark was selected.

See answer to question 1.

3. Describe in detail all steps taken by Applicant to determine whether Applicant's Mark was available for use and registration prior to adoption.

We were well aware of both "Apple" and "Free Crapple" that were registered.

4. Describe in detail when, where, and how Applicant's Mark is used and/or intended to be used.

Please see answer to question 1.

5. Identify each Person involved with or having knowledge of the selection, adoption, or first use of Applicant's Mark, and describe each such Person's knowledge.

Milton Barr and Daniel Kelman are the exclusive authors of this project and it was not revealed publicly until after the domain "crapple.com" was purchased and significant resources expended to make such a reality. The primary reason for this

was to prevent anyone else from trying to purchase the domain and driving up the price.

6. Describe in detail when and how Applicant first became aware of Opposer or Opposer's APPLE Marks, including the identification of all individuals having knowledge thereof.

Milton Barr and Daniel Kelman are unable to remember when they first became aware of Opposer's marks. But both agree that it was likely in elementary school playing Oregon Trail in the computer lab.

7. Identify each good or service for which Applicant has used or intends to use Applicant's Mark.

We plan to use the name Crapple to operate a website that purchases used smartphones. The smartphones will be repaired/refurbished and resold. At this point we have not determined whether we will resell the phones as "Crapple" phones, but we plan on selling through store fronts and on online auction sites.

8. Identify the Channels of Trade through which Applicant distributes, has distributed, or intends to distribute Applicant's Goods and Services.

Crapple only delivers a service: Crapple will buy your phone and resell or recycle it. Everything is done online and through the mail.

9. Identify Applicant's typical or target customers of Applicant's Goods and Services.

Any person who supports the environment, wants to pay less for a smartphone and doesn't mind that it was used.

10. Identify the annual unit and dollar volume of sales, from the date of first use to the present, for Applicant's Goods and Services.

We have not purchased a single phone through [www.crapple.com](http://www.crapple.com). We have postponed putting further funds into this idea until after this proceeding. It is well known the chilling effects these kinds of suits have on commerce.

11. Identify Applicant's annual expenditures for each advertising or promotional medium used to promote Applicant's Goods and Services.

This number is tough to quantify because it is difficult value the opportunity cost represented by the time spent working on the project.

12. Identify the Person(s) most knowledgeable about the sales and marketing efforts concerning Applicant's Goods and Services, and state the duties and position of each such individual.

Daniel Kelman and Milton Barr worked exclusively on the planning of Crapple, but along the way there were people who helped out with technical aspects, such as setting up the website.

We hired Masudur Rahman to build and design Crapple.com. We hired him on odesk.com because he was affordable and had a good rating. He was responsible for making sure the site was running properly.

13. Describe in detail each instance of which Applicant has actual or hearsay knowledge, directly or indirectly, of any communication, suggestion, or inquiry regarding an association, connection, or affiliation between Applicant, Applicant's Mark, or Applicant's Goods and Services, on the one hand, and Opposer, Opposer's Marks, or Opposer's Goods and Services, on the other hand, identify each Person involved in having knowledge of each such inquiry or communication.

There are plenty. People sometimes laugh or remark "that's funny" or something to that effect.

14. Describe in detail all instances of which Applicant has actual or hearsay knowledge of any inquiry, complaint, or other communication regarding Applicant's business or any other inquiry, complaint, or other communication by any Person regarding the qualities, advantages, or lack of quality of Applicant's Goods and Services, and identify each Person involved in or having knowledge of such inquiry, complaint, or communication.

At times there are complaints from Ninja Entertainment customers regarding an electronic device which ceases to work properly. The frequency of such an occurrence is not tracked, as it may be in the sale of new electronics. In the second-hand business we usually accommodate the customer with a discount on the new item sufficient to keep their business.

15. Identify every Person believed by Applicant to have relevant information with respect to any issue in this lawsuit and identify the relevant information such persons are likely to possess.

Milton Barr and Daniel Kelman. Everything.

Nigel Clouse. He was the original owner of Crapple.com and we purchased it from him. I do not recall the specifics of what we discussed, and I'm not sure of the value of it since it was mostly puffery surrounding a business deal.

Zachary Kelman. I am not sure the extent of what he knows, but he knows a lot about Crapple. He is a law student and my brother and has worked with me discussing legal aspects of this matter. His circa 2006 phone and/or his method of typing on it was/were responsible for trying to make popular the placing of an "l" at the end of a word to emphasize its importance in a sentence.

Masudur Rahman. He designed the Crapple website and did work to maintain it. He is also a professional cricket player in Bangladesh.